

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAY 6 - 1936

Monica Burke

CLERK

IN THE

**United States Court of Appeals
for the District of Columbia**

April Term 1936

No. 6666

852

EFFIE FRAZIER, Plaintiff in Error,

v.

COMMERCIAL CASUALTY INSURANCE Co., a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

ALVIN L. NEWMYER,
JOSEPH A. KAUFMANN,
Attorneys for Defendant in Error.

IN THE
**United States Court of Appeals
for the District of Columbia**

April Term 1936

No. 6666

EFFIE FRAZIER, *Plaintiff in Error,*

v.

COMMERCIAL CASUALTY INSURANCE Co., a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF CASE

On the petition filed in this court by the plaintiff in error, a writ of error was allowed to the Municipal Court of the District of Columbia on October 10, 1935. The plaintiff in error brought suit in the Municipal Court of the District of Columbia against the defendant in error, claiming to be entitled to the sum of \$200, as beneficiary under two certain life insurance policies, Numbers EWP1377 and BAN13529, issued by the defendant in error on the life of the husband of the plaintiff in error, George Frazier, who departed this life in the City of Washington, District of Columbia, on the 22nd day of September, 1933. An Affidavit of Merit was filed with the Bill of Particulars and an Affidavit of Defense was filed, meeting the Affidavit of

Merit, and thereafter on the 18th day of September, 1935, the parties went to trial before the Honorable Judge Raedy of the Municipal Court of the District of Columbia. Plaintiff in error, Effie Frazier, testified that her husband had taken out the life insurance policies referred to, and exhibited the said policies, which were then introduced in evidence; that she had mailed the cash and the premium receipt books on both policies to the company on some occasions, and that on some occasions a collector called for the premiums; she did not remember when she had mailed the last payment and premium receipt book to the office of the defendant in error; on cross examination she changed her statement, saying that although she did not remember the last time when she had mailed the premium receipt book and money to the defendant in error, she thought it was in May, 1933. She also testified that one week before her husband's death, Mr. C. G. Otwell, in charge of the Washington office of the defendant in error, called at her home and agreed to make a loan to her husband to reinstate the policies, and, this conversation being in the presence of her husband, herself and her daughter, Thelma; that her husband died on September 22, 1933, and that the same Mr. Otwell called the following evening and in the presence of herself and the same daughter referred to above, stated that the loan had been made and that the claims on the policies would be paid; plaintiff in error stated that the only person living who could have heard the first two conversations was the young daughter, Thelma (who was never brought to testify nor her absence accounted for). That Otwell returned about ten days later and on that occasion stated, in the presence of her two daughters, Gladys Milton and Alberta Frazier, that the company was not going to pay the policies.

The daughters last referred to, Gladys Milton and Alberta Frazier, followed their mother to the witness stand, and each testified that they were present on all three occasions when their mother talked with Mr. Otwell, and their testimony as to what Mr. Otwell said on these occasions was substantially the same as their mother's. They did not testify with regard to the payment of premiums at all. The plaintiff rested and the defendant in error carried on, the first witness being T. B. Davis, an employee of the defendant in error to August, 1934, but no longer with the said company. He testified that he was employed by the company in 1931, and that in December of that year he received cards of Alberta Frazier and George Frazier; that the card for these persons as handed to him showed that the policies had lapsed and his duty was to attempt to reinstate the policies; that he was unable to reinstate the policy of George Frazier, although he called on him several times in December, 1931, January, 1932, and February, 1932, and as he was unable to obtain any premiums from George Frazier, he turned Frazier's card back to the local office of the defendant in error.

C. G. Otwell, manager of the local office of the defendant in error took the stand and testified that he had been the local manager of the defendant company for twenty-one years and that the policies sued on were written through his office, and that the said local office is under his supervision. That the policies have no loan value nor any provision authorizing a loan and that he was not authorized to and did not make a loan on either of them; that each of the policies sued on stipulated a monthly premium of \$1.00; that no examination of the assured was necessary in order to obtain the insurance originally or to reinstate the same after it had lapsed; that if a premium

was not paid the month due, that the policy lapsed, according to its terms, but that the same might be reinstated during the assured's life, no matter how many monthly payments have been missed, by payment of one dollar as back premium and one dollar premium for the current month; that T. B. Davis attempted to reinstate the policies and turned the cards back when he was unsuccessful; that after Davis turned the cards back to him, that premiums had been paid on one policy, BAN13529, but that the last payment made on this policy was in June, 1932; that the last payment made on policy EWP1377 was in 1931; this testimony was made from a photostatic copy of the original report on these policies made up in his office, the original being sent in to the main office of the defendant in error, and said photostatic records, kept by the local office, were introduced into evidence by the defendant in error. Mr. Otwell denied being in the home of the plaintiff in error a week before the death of George Frazier and therefore denied any conversation on that date, as testified to by the plaintiff in error and her two daughters; he stated that he did call at the home of the plaintiff in error the evening following the death of the assured and said that at the time of his visit the only persons present were the plaintiff and a younger daughter, who was not present in court and who did not testify for the plaintiff, and who could not have been either Gladys Milton or Alberta Frazier, who he saw in court when they testified for the plaintiff in error; on that occasion he told the plaintiff in error that the policies which her husband had formerly maintained in his company had lapsed and that the company would not pay the same. In response to the notice to produce documents served on him by the plaintiff's attorney, Mr. Otwell testified that he had been re-

quested to produce the original policies and the premium receipt book; he called the attention of the lower Court to the fact that the original policies had already been introduced into evidence by the plaintiff, and stated that the premium receipt books had not been received in his office since the dates referred to as the dates of the last payment on the policies sued on, and that the said book had been returned to the assured at that time; that the said premium receipt books were no longer in his possession nor in the possession of the local office of the defendant in error. On cross-examination, Mr. Otwell verified the signature of one R. H. Davis, a former agent of the defendant in error, on two receipts on forms of the company; these receipts were introduced into evidence. Mr. Otwell then continued to testify regarding the same, saying that the first, dated June 9, 1932, in the sum of \$2.00, corresponded with the date of the last premium payment on policy BAN13529; that the second receipt, dated August, 1932, was for \$3.00, and that he had no record of the same in his office and he commented on the fact that the said receipt, dated two months later than the June receipt, was badly crumpled up and dirty and looked as if it had been changed or erased.

The case was argued by counsel for the plaintiff and defendant in error and the court entered a finding for the defendant in error forthwith. Thereafter a motion for a new trial was filed and argued on September 23, 1935, and said motion was overruled and judgment for finding entered in the case. Counsel for plaintiff in error noted an exception to the judgment and announced his intention of applying to this Honorable Court for a writ of error.

ARGUMENT

I

There was no objection by the plaintiff in error to the admission of a photostatic copy of records of the defendant in error, when introduced into evidence by the defendant in error.

It will be seen that this, the first assignment of error, was set forth in the petition for writ of certiorari as the chief ground for the allowance of that writ and that the exception alleged in said petition and in the brief of the defendant in error, was never taken. As a matter of fact the bill of exceptions was settled in such a manner as to specifically relieve the mind of the Court of Appeals as to any possibility of doubt as to an objection and exception having been taken (see Bill of Exceptions, page 3, line 24).

It is well settled as a matter of law that the appellant cannot go outside the record, as settled by the judge who heard the case, and import any error to the said court or attempt to set forth any alleged imperfections. This court has said that it has no power to correct imperfections or misstatements that are alleged to exist in the bill of exceptions taken and certified to this court; the bill of exceptions must be settled by the court below before whom the cause was tried and be brought into this court in a complete form and the court will then accept what is certified as being the actual truth. The bill of exceptions in this case was regularly settled and made a part of the record and it must be so accepted.

Patterson v. U. S., 38 App. D. C. 11.
Dreslin v. Phillips, 51 App. D. C. 324, 279 F. 303.
Johnson v. U. S., 38 App. D. C. 347, 225 U. S.
405, 32 Sup. Ct. 748, 56 L. ed. 1142.

Columbia Heights Realty Co. v. MacFarland,
31 App. D. C. 112.

Graziani v. Arundell, 55 App. D. C. 21, 299 F.
886.

Ray v. Smith, 17 Wall. 411, 21 L. ed. 666.

II.

The court did not err in overruling plaintiff's motion for judgment upon the evidence adduced at the trial, for the reason that no such motion was made and the record will not show any such motion to have been made.

Inasmuch as the record does not show any motion for judgment the same statement of law applies as to the alleged objection to the introduction of photostatic evidence applies to this assignment of error, in the first section of argument in this brief. The same not being a matter of record cannot be a ground of appeal, although it will be clearly seen in sub-heading 3 of this brief that if such a motion had been made, the same would have been properly overruled.

III.

The court did not err in finding in favor of the defendant upon the testimony adduced at the trial or in entering a judgment for and in favor of the defendant.

It will be clearly seen that the trial court was correct in finding for the appellee and in entering a judgment on the finding. The law is well established that evidence adduced must be considered in the most favorable light for the prevailing party in the trial court, in order to determine its sufficiency to sustain the verdict, and that where a trial court sits without a jury and is required to weigh evidence and decide

facts as well as law, its decision thereon, on hearing and seeing the witnesses, should not be disturbed by an appellate court which does neither, unless its judgment is manifestly wrong.

Capital Apartment Corporation v. Vassos, 62 App. D. C. 136, 65 F. (2d) 482.

Lawson v. U. S. Mining Co., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. ed. 65.

Butte & Superior Copper Co. v. Clark Montana Realty Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. ed. 447.

Shelley v. Wescott, 23 App. D. C. 135.

McLarren v. McLarren, 45 App. D. C. 237, 1 A.L.R. 1412.

Ellison v. Splain, 49 App. D. C. 99, 261 F. 247.

Castleman v. Avignone, 56 App. D. C. 253, 12 F. (2d) 326.

Internat'l Finance Corp. v. Gen. Motors Acceptance Corp., 63 App. D. C. 325, 72 F. (2d) 376.

The court held to the same effect in other Supreme Court and District of Columbia cases, holding that where the judge saw and heard the witnesses, that his finding would not be disturbed unless it clearly appeared that he misapprehended evidence or went against clear weight of the evidence in the following cases.

U. S. v. United Shoe Machine Co., 247 U. S. 32, 38 Sup. Ct. 473, 62 L. ed. 968.

Adamson v. Gilliland, 242 U. S. 350, 37 Sup. Ct. 169, 61 L. ed. 356.

Snow v. Snow, 50 App. D. C. 242, 270 Fed. 364.

Pilger v. Sutherland, 61 App. D. C. 84, 57 Fed. (2) 604.

It is clear from the evidence as set forth in this case that the three District of Columbia cases, presenting solely questions of estoppel, cited by plaintiff in error,

where insurance companies allowed payments to be made in a haphazard manner, do not apply here. The burden was squarely shouldered by the plaintiff, in an attempt to prove a policy loan and it will be seen that despite her own statement that only she and one young living daughter heard this conversation, her own witnesses contradicted her and stated that they also were present. The plaintiff did not account for the non-production of the daughter, whom she said was there, nor did she produce her, and without considering whether or not the local manager had authority under the policies to make a loan, which it is clear that he did not, it will be seen the testimony was conflicting and that it was a question for the court who saw and heard the witnesses for the plaintiff and defendant, to decide whether such a promise had been made or not, and to determine the issue of facts directly raised thereupon. All of the other evidence in the case appeared as a background or frame for this evidence as to whether there had been a loan or not and from it the court hearing the case had an opportunity to weigh the probable truthfulness of the witnesses who affirmed and disaffirmed the loan and whether any conversation had been actually had as to a loan at all.

CONCLUSION

The issues raised were on matters of fact only and the trial court properly considered the same and made its finding and entered its verdict thereon. All issues raised on this appeal have been fully answered, and it is clear that the case was passed on and decided properly, and the judgment of the Municipal Court of the District of Columbia should be affirmed.

Respectfully submitted,

ALVIN L. NEWMYER,

JOSEPH A. KAUFMANN,

Attorneys for Defendant in Error.

